

NORTH CAROLINA **FILED**
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 WAKE COUNTY
 WAKE COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT
 FILE NO. ____

PINNACLE APARTMENTS, LLC)
 BY _____)
 Petitioner,)
 v.)
 CITY OF RALEIGH; MARTIN)
 FEIN INTERESTS, INC.; MARTIN)
 FEIN INTERESTS, LTD.; and)
 WEINGARTEN INVESTMENTS)
 INC.)
 Respondents.)

**PETITION FOR
 WRIT OF CERTIORARI**

NOW COMES the Petitioner, PINNACLE APARTMENTS, LLC ("Petitioner"), by and through undersigned counsel, complaining of the Respondents, CITY OF RALEIGH; MARTIN FEIN INTERESTS, INC.; MARTIN FEIN INTERESTS, LTD. and WEINGARTEN INVESTMENTS INC. and files this Petition pursuant to N.C. Gen. Stat. § 160A-393 and other applicable law.

Petitioner respectfully petitions the Superior Court of Wake County to issue its Writ of Certiorari for judicial review of the Raleigh City Council's April 16, 2013 approval of a Site Plan (GH-5-2012) for the construction of a 355-unit residential project on Parcel Identification Numbers ("PINs") 0796-30-6759, 0796-30-2996, 0796-31-4150, 0796-40-0465, and 0796-40-3320 (the "Site Plan Property"). The Site Plan approval was memorialized by Findings of Fact and

Conclusions of Law dated May 7, 2013 and served upon Petitioner on May 23, 2013 (the "Decision"). A copy of the Decision is attached hereto as Exhibit A and is incorporated herein by reference.

PARTIES

1. Petitioner, Pinnacle Apartments, LLC, is a limited liability company organized under the laws of North Carolina and is the owner of 14.98 acres of property which is located at 5060 Edwards Mill Road, Raleigh, North Carolina (PIN 0795-39-9646) (the "Pinnacle Property"). The Pinnacle Property is directly across the existing Edwards Mill Road from the Site Plan Property and is, therefore, adjacent to or in close proximity to the Site Plan Property.

2. Respondent, City of Raleigh, is a body politic and corporate organized under the laws of North Carolina. The County is named as a Respondent to this certiorari proceeding pursuant to N.C. Gen. Stat. § 160A-393(e).

3. Upon information and belief, Respondent, Martin Fein Interests, Inc. ("Fein Inc. or the "Applicant"), is an inactive Texas corporation which, upon information and belief, is now known as Martin Fein Interests, Ltd. ("Fein Ltd."). However, Fein Inc. was the Site Plan applicant on the Site Plan Application and is the named Applicant in the Decision. Fein, Inc. and Fein Ltd. are both named as Respondents pursuant to N.C. Gen. Stat. § 160A-393(e).

4. Respondent, Weingarten Investments Inc. ("Weingarten"), is a North

Carolina limited liability company. Weingarten is the owner of the Property and is named as a Respondent pursuant to N.C. Gen. Stat. § 160A-393(e).

JURISDICTION AND VENUE

5. This Court has jurisdiction over this case under and by virtue of, inter alia, N.C. Gen. Stat. § 160A-393.

6. Venue is proper in this Court because this action involves property in Wake County and by virtue of, inter alia, N.C. Gen. Stat. § 1-77(2).

STANDING

7. Petitioner has standing to file this Petition pursuant to N.C. Gen. Stat. § 160A-393(d)(2) and Mangum v. City of Raleigh Board of Adjustment, 362 N.C. 640, 699 S.E.2d 279 (2008). Petitioner is an aggrieved party who will suffer special damages resulting in a diminution in value of the Pinnacle Property if the Site Plan Property is permitted to develop in accordance with the approved Site Plan as approved by the City Council. Specifically, inter alia, and as described infra, the Site Plan prohibits Petitioner from redeveloping the Pinnacle Property in accordance with the 2030 Comprehensive Plan of the City of Raleigh (the “Comprehensive Plan”), which causes Petitioner substantial damages and decreases the value of the Pinnacle Property.

8. Petitioner’s damages are distinct from the community-at-large, and

the Site Plan will adversely affect the value and use and enjoyment of Petitioner's property because of the adverse effect caused by the approved Site Plan which, inter alia, prohibits redevelopment of the Pinnacle Property in accordance with the Comprehensive Plan. In addition to the foregoing, the City Attorney stated on the Record at the April 16, 2013 hearing that the parties agreed that Petitioner had standing and Respondents posed no objection.

REASONS WRIT SHOULD BE ALLOWED

1. Petitioner owns and operates the Pinnacle Apartments, which are located on the Pinnacle Property directly across Edwards Mill Road from the Site Plan Property. The Pinnacle Apartments consist of ninety (90) apartment units which were constructed in or around 1982. Petitioner purchased the Pinnacle Property for the purpose of redevelopment.

2. The Comprehensive Plan sets forth the City's plan for future development and classifies properties into specific categories, which the City expects and desires to be followed for future zoning and development. The Comprehensive Plan also specifically states that its terms shall be taken into account in the City's review of discretionary development approvals, including Site Plan applications.

3. The Pinnacle Property is designated as Regional Mixed Use under the Comprehensive Plan, which contemplates that the Pinnacle Property be zoned and

developed in the future as medium and high-density housing, office development, hotels, and region serving retail uses. Petitioner intends to redevelop the Pinnacle Property in accordance with the Comprehensive Plan and has relied on the Comprehensive Plan with respect to its redevelopment plans.

4. On or about August 21, 2012, the Applicant submitted an application for Site Plan approval for the above-described residential project on the Site Plan Property (the “Application”). The main entrance to the project is *via* a road which connects Edwards Mill Road to Crabtree Valley Mall (the “Crabtree Connector Road”). The Crabtree Connector Road currently exists and its pre-Site Plan location is acceptable to Petitioner. However, in its Site Plan Application, in addition to the request for 355 residential units, the Applicant also proposed the relocation of the existing Crabtree Connector Road to a location which is across from the eastern property line of the Pinnacle Property. This location is not required for development of the Site Plan, but, upon information and belief, was relocated for the sole purpose of providing a higher financial return for the Applicant and Weingarten. There are several potential alternative locations which would not cause injury to Petitioner, but which the Applicant and Weingarten have refused to consider. The Applicant and Weingarten have refused to relocate the Crabtree Connector Road, even though they are aware of the significant damage the Site Plan location will cause to Petitioner.

5. The main entrance for the Pinnacle Apartments is currently located near the center of the Pinnacle Property on Edwards Mill Road. This entrance serves the existing 90 units; however, for the Pinnacle Property to be redeveloped in accordance with the Comprehensive Plan, a new full service entrance with a left turn lane will be required. Any new entrance must align with the Crabtree Connector Road as it appears on the Site Plan. In the absence of the approved Site Plan, the Pinnacle Property could increase its density and develop in accordance with the Comprehensive Plan by utilizing the current entrance. Now, however, as a result of the Site Plan, if the Pinnacle Property is redeveloped, Petitioner will be required to align its new full service main entrance with the Site Plan's main entrance. As explained below, however, such realignment is impossible because of the topography of the area and the City's regulations. As a result, the Site Plan, if implemented, will prohibit any redevelopment of the Pinnacle Property which would allow an increase in density in accordance with the Comprehensive Plan.

6. The relocation of the Crabtree Connector Road is unreasonable and unnecessarily harmful to Petitioner's property interests and as explained below, causes the proposed Site Plan to be in contravention of the requirements of Raleigh Code Section 10-2132.2(d). Specifically, and among other things, the location of the Crabtree Connector Road on the Site Plan will prohibit

development of the Pinnacle Property in accordance with the Comprehensive Plan.

7. On April 16, 2013, the Raleigh City Council (the “City Council”) held a quasi-judicial hearing on the Site Plan Application. In order for the Site Plan to be approved, the Applicant was required to present substantial, material and competent evidence to the City Council which established that the Site Plan met the requirements of Raleigh Code Section 10-2132.2(d). That provision provides in pertinent part:

. . . . It is recognized that sometimes particular problems are created in connection with a particular development at a particular location. No preliminary site plan or mixed use development Master Plan shall be approved unless the City Council, or the Planning Commission if the Planning Commission has authority to approve the site plan, first finds that the site plan meets all the following:

(1) The site plan provides for safe efficient and convenient vehicular, bicycle and pedestrian circulation, transit access, parking and load/unloading operations by considering among other things:

a. The physical character of adjacent and surrounding roads;
[and]

h. Interference with any other driveway;

. . .

(3) The site plan contains adequate measures to protect the development and other properties, including public corridors and facilities, from adverse effects expected from the proposed development or expansions to the existing development

8. The burden is on the Applicant to establish compliance with all Site Plan requirements under Raleigh Code Sections 10-2132(d)(1) and (3).

9. At the April 16, 2013 quasi-judicial hearing, the Applicant presented evidence in support of the Site Plan requirements. Such evidence, however, was insufficient to meet its burden under Code Sections 10-2132.2(d)(1) and (3). In particular, the Applicant presented absolutely no facts, data or evidence, expert or otherwise, that showed that the Site Plan contained adequate measures to protect the Pinnacle Property from adverse effects or that Petitioner would not be substantially harmed by the Site Plan with the Crabtree Connector Road located as proposed. In fact, the Applicant's witnesses testified that they had done no analysis whatsoever which addressed the impact of the relocation of the Crabtree Connector Road on the Pinnacle Property. Moreover, the Applicant considered no other potential locations for the Crabtree Connector Road other than that appearing on the Site Plan.

10. Conversely, Petitioner presented uncontroverted substantial, material and competent evidence, through expert testimony and otherwise, that showed that the requirements of Raleigh Code Sections 10-2132.2(d)(1) and (3) had not and could not be met so long as the Crabtree Connector Road remained at the Site Plan location.

11. The evidence presented at the hearing established that the Applicant chose to place the Crabtree Connector Road at a location which aligns with the most eastern point of the Pinnacle Property. To develop the Pinnacle Property in the future with increased density or any uses contemplated by the Comprehensive Plan, Petitioner would be required to align its new main entrance with the location set by the Site Plan. This new Pinnacle entrance would require a full-service driveway with a left turn lane in order to comply with the City's regulations.

12. The uncontroverted testimony by expert witnesses at the hearing established that it will be impossible to construct the full-service entrance which would be required by the City on the Pinnacle Property at a location across from the Site Plan's Crabtree Connector Road. This is because of, inter alia, the narrow right of way at this location on Edwards Mill Road, the topography of the Pinnacle Property, and the proximity to Petitioner's eastern property line. As a result, the Pinnacle Property cannot be rezoned or redeveloped in accordance with the Comprehensive Plan, cannot increase density, and is significantly damaged by the approval of the Site Plan.

13. The City's thoroughfare plan calls for a new realigned road known as Crabtree Valley Avenue, which will replace the current Edwards Mill Road in front of the Site Plan Property and the Pinnacle Property. It is not known when the realigned Crabtree Valley Avenue will be constructed, but, upon information

and belief, the effect on Petitioner's redevelopment from the Site Plan will be the same or worse if and when such construction occurs.

14. The undisputed evidence at the quasi-judicial hearing established that the Applicant could locate the Crabtree Connector Road at a place which would minimize the impact on Petitioner and allow redevelopment of the Pinnacle Property in accordance with the Comprehensive Plan. For example, the Applicant could move the Crabtree Connector Road 150 to 300 feet to the west, or switch the location of the main and secondary entrances on the Site Plan. This would still allow development of the Site Plan, but would not adversely impact Petitioner's property rights.

15. The undisputed evidence was that it was feasible for the Crabtree Connector Road to be relocated and for the Applicant to still have a viable Site Plan. Nonetheless, following the quasi-judicial hearing on April 16, 2013, the City Council approved the Site Plan as submitted by a vote of 7 to 0. The Decision was approved on May 7, 2013 and served upon the Petitioner on May 24, 2013.

16. The Council refused to consider Petitioner's inability to develop the Pinnacle Property in accordance with the Comprehensive Plan as an interest protected by the Site Plan standards. This was error. Section 10-2132.2(d) clearly

protects other properties from adverse effects, and effects on future development are significant and must be taken into account.

17. The Comprehensive Plan is the City's mechanism to plan future development in the City. The Comprehensive Plan specifically designates the Pinnacle Property as Regional Mixed Use; a classification to which Petitioner is entitled and must be allowed to use for future development. The City Council's Approval of the Applicant's Site Plan, which eliminates Petitioner's ability to develop the Pinnacle Property pursuant to the Comprehensive Plan, is a substantial detriment to Petitioner's rights and interferes with the future development of the Pinnacle Property. The approval of the Site Plan, which could have protected these rights, but did not, does not comply with the City Code's Site Plan Standards.

18. The Site Plan Standards in the City Code, including but not limited to Section 10-2132.2(d), not only protects existing development of "other properties," but also are intended to protect the future development of those properties, particularly if such development is encouraged and contemplated by the Comprehensive Plan. The Site Plan standards are intended to protect other properties from adverse effects, and cannot be interpreted to allow one landowner to virtually extinguish the redevelopment rights of another, especially for no reason other than mere monetary gain.

19. The City Council's vote was memorialized by the Decision. The Decision was unlawful, inter alia, for the following reasons, as well as those set forth in the foregoing paragraphs:

- a. The City failed to take into account the Site Plan's adverse effects on the Pinnacle Property, e.g., Petitioner's ability to develop in the future in accordance with the Comprehensive Plan.
- b. The City committed errors of law, applied the wrong standards, disregarded state and local law, acted outside the scope of its authority, abused its discretion and acted arbitrarily and capriciously, when it approved the Site Plan.
- c. The Findings of Fact in the Decision are not supported by the substantial, material and competent evidence in the Record;
- d. Many of the Findings of Fact, including but not limited to Findings of Fact 19 through 23, are not findings of fact at all, but recitations of the evidence and cannot be considered by a reviewing court in determining whether the Conclusions of Law were supported by the Findings of Fact;
- e. The Conclusions of Law in the Decision are not supported by the Findings of Fact and are legally incorrect, unlawful and in direct contravention of the Findings of Fact and the substantial, material and competent evidence in the Record;
- f. The Applicant failed to carry its burden to produce substantial, competent evidence to show compliance with Raleigh Code Section 10-2132(d).
- g. Petitioner presented uncontroverted substantial, material and competent evidence, showing the Site Plan will adversely affect Petitioner's Property, which requires the Site Plan be denied.
- h. The Applicant was not an active and existing corporation at the time the Site Plan was submitted or at the time the Site Plan was

approved.

14. Accordingly, and based on the reasons set forth herein, the Decision was unlawful and must be reversed for the following reasons:

- a. The Decision was based on errors of law;
- b. The Decision was not supported by substantial, competent and material evidence in the record;
- c. The Decision was in excess of the City Council's statutory authority;
- d. The Decision was inconsistent with the procedures and requirements of the Raleigh Zoning Code, the North Carolina General Statutes, and other applicable law;
- e. The Decision did not comport with due process;
- f. The Decision was arbitrary and capricious;
- g. The City Council failed to comply with the requirements of the Raleigh Zoning Code, the North Carolina General Statutes, and other applicable law;
- h. The City Council did not follow the procedures specified by law; and
- i. The Decision was otherwise unlawful.


15. For the reasons set forth herein, the Decision must be reversed and the matter remanded to the City of Raleigh City Council with an Order that the Site Plan be denied.


WHEREFORE, Petitioner prays unto the Court for the following relief:

1. That this Court issue a Writ of Certiorari to the City directing the City to certify to this Court the complete record of the proceedings before the City Council within sixty (60) days of the Writ being issued;
2. That the Court conduct a hearing on this matter at a time certain;
3. That this Court reverse the Decision approving the Site Plan and remand the case to the City Council with an order that the Site Plan be denied;
4. That Petitioner be awarded its attorney's fees pursuant to N.C. Gen. Stat. § 6-21.7 and other applicable law;
5. That all costs be taxed against Respondents; and
6. That this Court Order such other and further relief as it deems just and proper.

This the 5th day of June, 2013.

CURRIN & CURRIN

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